Filed 5/25/12 Hartnett v. San Diego Bd. of Education CA

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

RODGER J. HARTNETT, Plaintiff and Appellant, v. SAN DIEGO COUNTY BOARD OF EDUCATION et al., Defendants and Respondents.	D059646 (Super. Ct. No. 37-2010-00095925-CU-WT-CTL)

APPEAL from a postjudgment order of the Superior Court of San Diego County, Joel M. Pressman, Judge. Affirmed.

Plaintiff and appellant Rodger J. Hartnett appeals from an order awarding the San Diego County Office of Education Personnel Commission (Commission) $12,633 in attorney fees under Code of Civil Procedure section 425.16, subdivision (c).[1] Hartnett

1 Statutory references are to the Code of Civil Procedure unless otherwise indicated. Section 425.16 is commonly known as the anti-SLAPP statute. "SLAPP is an acronym for 'strategic lawsuit against public participation.' " (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

contends Commission should be equitably estopped from recovering attorney fees based on factual representations it made prior to the motion hearing. He argues estopping the Commission from such recovery in this matter will not defeat the public policy of granting section 425.16 fees to prevailing parties. Commission has asked that we dismiss Hartnett's appeal because he did not appeal from the order awarding it attorney fees as the prevailing defendant under the statute.

We conclude this court has jurisdiction over Hartnett's appeal and may hear the issues raised by the parties in connection with Commission's motion for attorney fees. However, because Hartnett failed to raise his factual arguments and theory of estoppel in the trial court, we conclude he has forfeited that claim on appeal. Accordingly, we affirm the postjudgment order.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2010, Hartnett filed a complaint for damages against Commission and other entities and individuals. Commission thereafter successfully moved to strike Hartnett's complaint under section 425.16. On November 5, 2010, Commission served a notice of ruling that the motion was granted as to all causes of action, and stating: "Attorneys' fees will be awarded pursuant to a separate, noticed motion."[2]

---

2 The court's November 5, 2010 tentative ruling granting Commission's motion, which became the court's order, states in part: "[S]ection 425.16[, subdivision] (c) provides: (c) In any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. Any request for fees and costs by the prevailing party with regard to this motion shall be addressed by the Court via a separate noticed motion under . . . section 425.16[, subdivision] (c)."

On November 15, 2010, the court entered judgment in Commission's favor. Citing section 425.16, subdivision (c), the judgment recites: "Defendant [Commission] is entitled to its attorneys' fees and costs." The judgment also states: "Any request for Attorneys' Fees and Costs incurred by [Commission] is to be considered upon filing of a noticed motion."

On February 18, 2011, Commission moved for $10,458 in attorney fees and costs. Referencing the November 15, 2010 judgment, Commission argued it properly sought attorney fees for all defense costs and fees reasonably related to the special motion, including costs and fees through the appeal. It accompanied the motion with the declaration of Meredith Karasch, its "counsel of record," who stated that as a result of Hartnett's lawsuit, "legal fees and costs have been incurred on the Commission's behalf." Karasch set out the hours she and another attorney had expended in preparing the motion and supporting documents, preparing for oral argument, traveling to and from the hearing, and handling other tasks relating to the motion after the hearing. She also sought fees relating to Hartnett's motion for reconsideration of the order granting Commission's special motion to strike.

Hartnett opposed the motion. He argued Commission was not entitled to seek attorney fees in that it was not the "real party in interest" that had incurred or paid attorney fees; that its defense was covered by the San Diego County Office of Education (Office), a separate public entity. According to Hartnett, Commission's counsel had conceded in an October 20, 2010 letter that Commission did not pay legal fees and could not take an active role in arguing for recovery of attorney fees if its motion were

granted.[3] Hartnett argued Commission did not move for fees on Office's behalf or present evidence that it had any obligation to pay Office, and that Commission had no "interest, title or claim" to any fees that Office may have incurred.

In reply, Commission sought an increased amount of fees, $12,633, due to Hartnett's additional court filings. Citing Education Code sections 1311, 45240-45243 and 45245, Commission argued it had standing to seek attorney fees because it was an appointed body of Office, not a separate public entity. It stated it was represented by separate counsel to maintain its neutral role as a trier of fact.

The trial court heard argument on the motion on February 18, 2010. Hartnett's counsel argued that by its October 20, 2010 letter, Commission had essentially waived its right to seek attorney fees. He maintained Commission and Office were represented by separate counsel, and were separate and distinct parties. Commission's counsel denied the letter constituted a relinquishment of attorney fees, pointing out the assertion that Commission did not intend to take an active role in arguing in favor of such fees was not

---

[3] The October 20, 2010 letter was written by Debra Bray, an attorney at Liebert Cassidy Whitmore. In it, she acknowledged Hartnett had filed an amended complaint dismissing Commission from the causes of action asserted against it in his original complaint. She then stated: "Assuming that the Amended Complaint removes the Commission as a defendant, this will likely be dispositive of the Commission's Demurrer and it would be taken off calendar. However, it is not dispositive of the anti-slapp motion. There is still the issue of attorneys' fees for making the motion. The Commission does not pay its own legal fees. The fees are paid by the County Office. Therefore, the Commission believes it to be appropriate to allow the County Office to determine whether it is willing to waive potential recovery of fees on the anti-slapp motion brought on behalf of the Commission, and, if not, to pursue the fees to which it may be entitled. Other than providing information on the amount of legal fees for use by the Court, the Commission does not intend to take an active role in arguing in favor of recovery of fees."

a clear and unambiguous waiver, and the letter indicated Commission was still interested in obtaining fees. She argued the statute did not require Commission to pay fees to be entitled to recover them as a prevailing party. Hartnett's counsel then "elaborate[d]" on his waiver argument by saying: "[I]t doesn't waive it, but it would be an estoppel to seek the fees if you tell me you're not going to recover."

On February 22, 2010, the trial court granted Commission's motion. The minute order states: "Defendant Commission's motion for [an] award of attorney fees and costs is granted. Based on the evidence before the Court, the Court concludes that the Personnel Commission is entitled to reasonable attorney's fees in the amount of $12,633." Hartnett appeals from that order.[4]

DISCUSSION

I. *There Is No Basis to Dismiss the Appeal for Hartnett's Failure to Appeal from the November 15, 2010 Judgment*

Commission contends we should dismiss Hartnett's appeal because he failed to file a notice of appeal from the actual order entitling Commission to its attorney fees, namely, the trial court's November 15, 2010 judgment. Citing *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 997 (*Grant*), Commission argues that prior judgment was separately appealable. It maintains, without reference to authority, that if a party wishes to

---

[4] Hartnett's notice of appeal states he is appealing a February 24, 2010 postjudgment order. We construe Hartnett's notice of appeal liberally, reading it as intended to refer to the trial court's February 22, 2010 order awarding attorney fees. (Accord, *D'Avola v. Anderson* (1996) 47 Cal.App.4th 358, 361-363 [explaining that courts accept notices of appeal with technical errors, including the wrong case number].)

challenge whether another party is entitled to fees, it must challenge the order awarding fees, even if the amount is left for later determination. Commission points out that in this appeal, Hartnett merely challenges its entitlement to fees, not the amount of the fees the trial court awarded.

In *Grant*, the court entered a judgment specifically awarding attorney fees as costs, but leaving the amount of the award blank for later completion. (*Grant, supra,* 2 Cal.App.4th at pp. 996.) The appellants in *Grant* timely appealed from the judgment awarding fees; they filed no separate notice of appeal from the court's later postjudgment order awarding fees and costs. (*Id*. at p. 996.) The notice of appeal in that case expressly challenged the propriety of awarding fees. (*Id*. at p. 997.)

On the respondents' challenge to appealability, the *Grant* court held it had jurisdiction over the issue: "[W]hen a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal subsumes any later order setting the amounts of the award." (*Grant, supra*, 2 Cal.App.4th at p. 998.) It observed that appellants *could have* filed a separate notice of appeal from the order awarding fees and costs, which was an appealable order pursuant to section 904.1, subdivision (b). (*Grant, supra,* 2 Cal.App.4th at pp. 996, 997.) However, it reasoned a separate appeal to that postjudgment order was not *required* under the circumstances because it would serve no purpose when the judgment itself expressly made an award of costs and fees, and because "[t]he notice of appeal itself challenges the appropriateness of awarding fees and costs to respondents." (*Grant*, at p. 997.) "Thus,

appellate jurisdiction exists and respondents are on notice that appellants are seeking review of the award. Respondents have not been misled." (*Ibid*.)

In *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, the trial court entered a judgment providing it included " 'costs of suit in the amount of [blank] to be determined by the court' " and further provided that defendants were to submit a written request for attorney fees. (*Id*. at pp. 762-763.) Following defendants' attorney fee motion and a subsequent order awarding attorney fees under two different statutes, the plaintiffs appealed from the judgment, but not the postjudgment attorney fee order. (*Id*. at p. 763.) Addressing the defendants' arguments that the fee awards were not reviewable, the appellate court in *Gouskos* gleaned a rule from *Grant* and another case involving a discretionary award of expert witness fees: the language of the judgment at issue in that case could only be construed as encompassing attorney fees if the defendants were entitled to such fees as a matter of right. (*Id*. at p. 764.) Based on this rule, the court limited its review of the attorney fees to those awarded against one of the defendants under a mandatory fee statute; that award was "incidental to the judgment and reviewable." (*Id*. at p. 765.)

Here, while the November 15, 2010 judgment recited that Commission was entitled to recover its attorney fees as in *Grant*, the judgment also expressly instructed that "[a]ny request" by Commission for attorney fees and costs was to be considered by noticed motion. Further, Hartnett expressly raised issues pertaining to Commission's ability to recover fees in opposition to Commission's motion, and Commission responded to those arguments. Both parties were aware that Hartnett challenged Commission's

standing to move for attorney fees solely on grounds Commission had assertedly not *incurred* any fees, and was not the proper party to seek such fees. Neither *Grant* nor *Gouskos* stand for the proposition that a party *must* appeal from a judgment mentioning a party's entitlement to attorney fees and costs or lose the right to appeal where, as here, issues related to the recovery of such fees and costs are adjudicated in a noticed motion and awarded in a postjudgment order, which is separately appealable. (§ 904.1, subd. (a)(2); *PR Burke Corp. v. Victor Valley Wastwater Reclamation Authority* (2002) 98 Cal.App.4th 1047, 1053; *R.P. Richards, Inc. v. Chartered Construction Corp.* (2000) 83 Cal.App.4th 146, 158.)[5] *Grant* explains that in such a case, an appeal from the judgment will suffice to preserve arguments relating to the fee award, *despite* the party's failure to appeal from the postjudgment order. These circumstances are unlike *Grant* and *Gouskos* because here, Hartnett did in fact appeal from the postjudgment order awarding attorney fees and costs and adjudicating the standing issues, thereby preserving for appeal the arguments he advanced in those proceedings.[6]

---

[5] Indeed, in *PR Burke Corp.*, the appellate court held that the portion of a judgment determining entitlement to attorney fees but not the amount would be nonfinal and nonappealable because further judicial action is necessary to determine the extent of the party's entitlement to fees. (*PR Burke Corp. v. Victor Valley Wastewater Reclamation Authority*, *supra*, 98 Cal.App.4th at pp. 1053-1054 ["[I]f a judgment determines that a party is entitled to attorney's fees but does not determine the amount, that portion of the judgment is nonfinal and nonappealable"].)

[6] Hartnett also filed a notice of appeal from the November 15, 2010 judgment, but his appeal raises issues relating to the merits of the trial court's anti-SLAPP ruling and the court's denial of his petition for writ of prohibition. Those issues are the subject of a separate appeal and decision. (*Hartnett v. San Diego County Board of Education*, et al. (May 25, 2012, D059189) [nonpub. opn.].)

Because here, Hartnett has appealed from the postjudgment order addressing Commission's request for attorney fees, we have jurisdiction to consider the arguments raised and considered in Commission's motion and Hartnett's opposition, including whether Commission had standing to recover attorney fees and costs in connection with its section 425.16 special motion to strike. We thus deny Commission's request to dismiss Hartnett's appeal.

II. *Equitable Estoppel*

Hartnett contends Commission should be equitably estopped from claiming entitlement to attorney fees. He maintains Commission, by its October 20, 2010 letter, "disavowed" recovery of such fees "to gain a strategic advantage." (Capitalization omitted.) According to Hartnett, Commission was apprised of the relevant facts in that it had received an offer to compromise from Hartnett and knew the terms of that offer were dismissal in exchange for a waiver of anti-SLAPP attorney fees, then advised Hartnett it was deferring the question of attorney fee recovery to Office, which, Hartnett argues, was a tactic intended to lull him into a sense of security and compromise regarding the anti-SLAPP motion. Hartnett argues he was ignorant of the true facts: that Commission in fact intended to pursue anti-SLAPP attorney fees, and relied on Commission's representations to his detriment, leading him to believe settlement negotiations were proceeding and causing him to leave Commission's motion unopposed.

Commission responds in part that Hartnett forfeited these estoppel arguments on appeal because he did not present them to the trial court. It points out Hartnett's attorney in his declaration accompanying the opposition to Commission's motion did not address

the pending settlement, the settlement terms, or his reasons for failing to oppose Commission's special motion to strike.

As we will explain, we agree Hartnett forfeited his equitable estoppel arguments because the question of whether Commission should be estopped to claim attorney fees turns on facts that were not raised or addressed in the trial court. Our explanation requires an overview of the principles of equitable estoppel.

A. *Legal Principles Pertaining to Equitable Estoppel*

" 'The doctrine of equitable estoppel is based on the theory that a party who by his declarations or conduct misleads another to his prejudice should be estopped from obtaining the benefits of his misconduct.' " (*Cotta v. City and County of San Francisco* (2007) 157 Cal.App.4th 1550, 1567.) The essence of the principle is that " ' "one's conduct has induced another to take such a position that he will be injured if the first party is permitted to repudiate his acts." ' " (*Elliano v. Assurance Co. of America* (1970) 3 Cal.App.3d 446, 450-451; see also *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 16.) It is established by showing (1) the party to be estopped knew the facts; (2) that party intended his or her conduct would be acted upon or acted such that the party asserting estoppel had the right to believe it was so intended; (3) the party asserting estoppel was ignorant of the true state of the facts; and (4) the party asserting estoppel relied upon the conduct to his or her injury. (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725; *Cotta*, at p. 1567; *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 47.)

" 'It is well settled that the estoppel doctrine is applicable to government entities where " 'justice and right require it.' [Citations.] Correlative to this general rule, however, is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefits of the public[.]' [Citation.] The tension between these twin principles makes up the doctrinal context in which concrete issues are decided." ' " (*Cotta v. City and County of San Francisco*, *supra*, 157 Cal.App.4th at p. 1567.)

In general, the determination of estoppel is a question of fact, with the burden of proof on the party asserting the defense. (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 319; *Silva v. National American Life Ins. Co.* (1976) 58 Cal.App.3d 609, 615.) However, the issue becomes one of law when "the facts are undisputed and only one inference may reasonably be drawn . . . ." (*Platt*, at p. 319; *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 179.) Additionally, the weighing of policy concerns that must be conducted in a case of estoppel against the government is in part a question of law. (*Mt. Holyoke Homes, LP v. California Coastal Com'n* (2008) 167 Cal.App.4th 830, 840.) Absent these circumstances, whether to apply equitable estoppel is peculiarly a factual inquiry because it "turns on the facts surrounding a party's conduct . . . ." (*Del Cerro*, at pp. 420-421.) Thus, on appeal, the relevant inquiry is whether the trial court's determination is supported by substantial evidence. (*Silva v. National American Life Ins. Co.*, at p. 615.)

B. *Hartnett Forfeited His Claim of Equitable Estoppel by Failing to Present the Underlying Facts and Theories in the Trial Court*

In Hartnett's opposition to Commission's motion for attorney fees, he did not raise an issue of equitable estoppel or otherwise address the pending settlement that he now maintains is the basis for applying equitable estoppel against Commission. Though he submitted a declaration from his counsel, in it, counsel did not mention estoppel, discuss the settlement, his reliance upon it, or the reasons he elected to leave Commission's special motion to strike unopposed. Hartnett's counsel mentioned estoppel for the first time during oral arguments in the trial court. However, Hartnett's theory of equitable estoppel in this case turns on numerous factual questions concerning Commission's intentions and Hartnett's counsel's reliance, if any, on Commission's representations or conduct. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 34 [proof of estoppel requires detrimental reliance].) Counsel's fleeting reference to the doctrine, without presentation of the theory or underlying facts supporting it, was insufficient to allow the trial court to rule on the issue. Thus, the trial court did not have an opportunity to pass on these factual questions, resolution of which is not properly within the scope of our review.

These circumstances compel us to conclude Hartnett has forfeited any argument that Commission should be equitably estopped from seeking recovery of its attorney fees and costs pursuant to section 425.16, subdivision (c). The fundamental principle that governs any claim of forfeiture is fairness. " 'As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to

the theory (or theories) on which their cases were tried. This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal.' " (*P & D Consultants, Inc. v. City of Carlsbad* (2010) 190 Cal.App.4th 1332, 1344; see *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2006) 136 Cal.App.4th 212, 226.) Moreover, "[t]he general rule that a legal theory may not be raised for the first time on appeal is to be stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial." (*Bogacki v. Board of Supervisors* (1971) 5 Cal.3d 771, 780; see also *People v. Scott* (2011) 52 Cal.4th 452, 482 [because the trial court had no "opportunity to resolve material factual disputes and make necessary factual findings," the defendant's arguments raised for the first time on appeal were forfeited]; *JRS Products, Inc. v. Matsushita Electric Corp. of America* (2004) 115 Cal.App.4th 168, 178 [policy behind the rule that an appellate court generally will not review an argument raised for the first time on appeal is based on fairness, as "[a]ppellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider"].) Because the theories and factual arguments advanced by Hartnett are raised for the first time on appeal, we deem them forfeited.

DISPOSITION

The postjudgment order is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.